IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 424 OF 2006

Fardeen Feroz Khan ....Petitioner/
(Orig.Accd.no.2)

versus

1. Union of India
At the instance of
Narcotics Control Bureau
2. The State of Maharashtra ...Respondents.

Mr.K.T.S.Tulsi, Sr.Counsel with Mr.A.R.Khan, Ms. Niloufer Saiyed and Atiar Dey for the petitioner.

Poornima Kantharia for NCB/Union of India.

Satish Borulkar for the State.

CORAM: S.C.DHARMADHIKARI, J.
JUDGEMENT RESERVED :19.12.2006
JUDGEMENT PRONOUNCED: 8.02.2007.

ORAL JUDGMENT :

1. By this application, the petitioner challenges an order dated 22.9.2006 passed in Misc.Application No. 237 of 2006 in NDPS Spl.Case No. 97 of 2001.

2. It is not in dispute that by this order the application preferred by the petitioner has been

rejected.

3. A copy of that application is at page 317 of this Revision paper book.

4. The brief facts leading to this application (Misc.Application No. 236 of 2006) being filed by the applicant, are that the applicant is Accused No.2 in the NDPS Spl.Case No.97 of 2001. The NDPS case arises out of a complaint dated 2.8.2001 filed by the respondents in the Special Court. The petitioner states that on this complaint, the above NDPS case has been registered.

5. The case of the prosecution according to the present petitioner is as summarised by him in his application before the Court below. It proceeds thus :-

(i) That on 5.5.2001 the officers of the Narcotics Control Bureau/Respondent, based on prior information, arranged surveillance at an ATM Centre, Hong Kong Bank, J.V.P.D. Scheme,

Mumbai. One Nasir A. Shaikh/Accused No.1 was spotted by the officers of the Respondent alighting from the taxi and waiting on the footpath opposite the ATM Centre. At about 1.40 hrs the Applicant arrived on the spot in an Opel Astra Car registration no. MH-02-N-4043 ("the Car") and parked near the abovementioned ATM Centre. That the Accused No.1 entered the Car and the applicant was noticed near an ATM machine inserting an ATM card into the slot. The officers of the Respondent no.1 surrounded the Car and on demand, were handed ‘goods’ by Accused No.1 later confirmed to be 11 plastic vials containing 9 gms of cocaine.

(ii) That as per the complaint, on preliminary interrogation, Accused No.1 revealed that the seized 9 gms of cocaine was out of 15 gms procured from one Tony Gomes/Accused No.3. However the Seizure panchanama dt. 5.5.2001 and the NCB report to Head Office, Delhi dt. 5.5.2001 annexed with

the complaint, reveal that during the abovementioned preliminary interrogation Accused No.1 had further specified that he had come to the spot to deliver 1 gm cocaine to the Applicant.

(iii) That as per the complaint, the statement of Applicant was recorded at the office of the Respondent u/s 67 NDPS on 05.05.2001 wherein, the Applicant stated that he had telephoned Accused no.1 on the evening of 4.5.2001 and asked for 1 gm of cocaine to be brought to HSBC at night and that he normally paid Accused No.1 Rs.3500/- for one gram. The Applicant also stated that he had met Accused No.1 at a bar/pub about 4 months ago and began using cocaine only 4 months ago solely for personal consumption and did not indulge with anyone else. He further stated that over the 4 months, he procured 1 gm of cocaine on 4-5 occasions solely for personal use and that the 1 gm would last over 2-3 days. The Applicant also stated that he began

consumption of cocaine due to occupational stress which he faced during his shooting of films, as often the work extended for about 14-16 years.

(iv) That similarly, as per the complaint, the Accused no.1 in his statement u/s 67 of the NDPS Act recorded on 5.5.2001, stated that while in the car with the Applicant, it was agreed that he would give the Applicant 1 gm of cocaine out of the 9 gms in his possession. He further stated that the rest of the 8 gm was for his personal consumption and selling to other persons. He stated that he was to sell 1 gm of cocaine to the Accused @ Rs.3500/- per gram and that the Accused on various earlier occasions had purchased 1 gm from him on each occasion @ Rs.3,000/- per gram. He also confirmed that he had purchased a total of 15 gms from one Tony Hector Gomes/Accused No.3 @ Rs.3,000/- and had already consumed 6 gms of it.

(v) That no other incriminating items or articles were found during the spot search of the Applicant or during the subsequent search of the Applicant's residence at Juhu on 6.5.2001.

(vi) That on 05.05.2001 Accused No.3 was intercepted and his statement was recorded wherein he stated that he had supplied 15 gms of cocaine to Accused No.1.

(vii) That all accused were placed under arrest on the basis of their statements.

(viii) That after completion of the investigation the prosecution filed complaint dated 02.08.2001 wherein Para 30 simply stated that Accused No.1 was found in possession of 11 vials of 9 gms cocaine inside the Car; that the Applicant attempted to purchase the cocaine from Accused No.1 and that the seized cocaine was brought by Accused No.1 for selling to the Applicant. Para 31 of the

complaint alleges that the Applicant had therefore committed offences u/s 28 r/w sections 21 and 8(c) of the NDPS. It is submitted that in complete disregard to the contents of the complaint itself and the evidence on record, these crucial paragraphs of the complaint, do not mention that the extent of the Applicant's involvement is 1 gm of cocaine.

(ix) That the Applicant filed Misc.Application No.78 of 2006 in the Hon'ble Special Court praying for amendment of the complaint, to specify the quantity involved in the allegation against him in order that he could prepare an appropriate legal defence within the context of the provisions of NDPS Act as amended by Act 9 of 2001 ("the 2001 Act"). The 2001 Act with its stated objective of imposing severe punishments for drug traffickers and adopting a reformative approach towards addicts, had rationalised the sentence structure on the basis of small,

non-commerical and commercial quantities. (For cocaine: 2 gms, 3-100 gms and above 100 gms respectively as per Government Notification S.O.1055(E) dt.19.10.2001).

6. It is not in dispute that the applicant applied for bail in NDPS Special Case. That Bail Application was numbered as Bail Application No.44 of 2001. On 10.5.2001 the NDPS Special Judge granted bail to the applicant.

7. Thereafter, the applicant filed Misc.Application No.78 of 2006 praying for amendment to the complaint to specify the quantity involved against him. According to him, this was necessary in order to enable him to prepare appropriate legal defence. His contention was that the defence would be prepared bearing in mind the amendment to the NDPS Act in 2001. This application was rejected by NDPS Special Judge.

8. Misc.Application No. 237 of 2006 which led to

the impugned order being passed was filed on the basis that the prosecution itself alleges that the applicant has taken delivery of 1 gm of cocaine in one plastic vial. A telephone conversation between the applicant and the Accused No.1 is referred to in this behalf. Even the statement of the applicant recorded under Section 67 of the NDPS Act indicates that a rate of Rs.3500/- per gram was fixed for this one gm of cocaine. The applicant proceeded to withdraw money from the ATM machine by inserting his card. The applicant was to withdraw a sum of Rs.4,000/- from his ATM. Thus, out of 9 gms of cocaine in 11 vials, Original Accused no.1 was to deliver only 1 gram to the applicant and balance was to be either consumed by Original Accused No.1 or sold to persons with whom he had dealings. The argument therefore is that the applicant is involved in the crime only to the extent of procuring or attempting to procure 1 gm of cocaine which is a small quantity. In such circumstances, Section 64A of NDPS Act was attracted.

9. he application was opposed by the

prosecution/Narcotic Control Bureau. In its reply it contended that the application preferred by the applicant is not maintainable. On earlier occasion under the garb of applying for amendment of the complaint, similar relief was claimed by the applicant but that was not granted by the court. The present application also claims identical relief and therefore is liable to be rejected on this ground alone. It was then contended that " when the applicant was apprehended along with co-acused No.1 and when seizure panchanama was drawn at the spot on 5.5.2001, strangely not a single word was uttered by the applicant before the officers that he had come to buy one gram of cocaine only or that he was an addict or that he had used his ATM card to withdraw the amount to make payment for one gram of cocaine only. Thus, according to prosecution conduct of applicant itself is quite doubtful, and now the applicant is trying to make out some defence, however,it has no basis. By referring to the documents on record, Ld APP pointed out various contents from the complaint, statement of co-accused, applicant and other documents filed and

had submitted that from these documents it cannot be said that applicant is involved in a case involving only one gram of cocaine. It is also contended that there is nothing on record to establish that applicant was an addict or he has dependence on the narcotic drug i.e. cocaine which is a condition precedent for claiming immunity by accused u/s 64A of the Act, and therefore prayed that as the basic requirements of such application are not fulfilled, the application is liable to be rejected.

10. This application was also heard by the same learned Judge and by the impugned order he held that it is not correct that the applicant is involved in the case only to the extent indicated by him. On the other hand, there is enough material to hold that nine gms of cocaine came to be recovered and seized under the panchanama from the spot in the presence of the applicant and accused No.1. In the absence of evidence being led, it would not be proper to arrive at a conclusion that the applicant is involved in a seizure of small quantity of contraband drug. In other words, his involvement in

the crime is not only to the extent of small quantity. The learned Judge also relied upon his observations made while rejecting Misc. Application No. 78 of 2006 filed by this very applicant. He has also relied upon the documents filed with the complaint, seizure panchanama, statement of co-accused so also that of the applicant and contents of Remand Application. He concluded that prima-facie the involvement of the applicant is not only to the extent of possession of 1 gm of cocaine. Infact, the applicant did not disclose to the co-accused that he was going to purchase only one gm of cocaine from him. The learned Judge has relied upon the statement of co-accused in this behalf. He stated that it is the version of the applicant that he came to the spot only to collect one gm of cocaine from accused No.1 but this version can only be tested when evidence is led at the trial. All materials which are produced cannot be relied straight away and that is how the application was rejected. The Learned Judge’s observations in paragraph 8 and 9 are clear.

11. It is thereafter the learned Judge discusses the arguments based on applicability of Section 64A of the NDPS Act.

12. Learned Judge concludes that no case is made out for applying the above invoked provision because the applicant would have to establish that he is an "addict". That observation is made in para 11 of the impugned order. It is this conclusion of the Learned Judge which is subject matter of challenge before me.

13. Mr.Tulsi, learned Senior Counsel appearing for the applicant, submits that, the judgment and order of the court below is patently erroneous and unsustainable in law and perverse. He submits that if the view taken by the learned Judge is sustained, it would result in manifest injustice to not only the applicant but all accused who are similarly placed like him. He submits that the prosecution all throughout has alleged that the applicant had come at the site only to collect 1 gm of cocaine. Therefore, it is not proper to urge that the

recovery from the applicant is in doubt and at this stage it is improper to hold that the applicant was not involved in the crime only to the extent of 1 gm of cocaine. According to Mr.Tulsi, this conclusion by the Learned Judge is contrary to the complaint of the Narcotics Control Bureau. Further, Mr.Tulsi urges that the rejection of the earlier application praying for amendment to the complaint is of no consequence because that is something unrelated to the relief of immunity from prosecution.

14. Mr.Tulsi, has firstly laid emphasis on statement of Nasir Abdul Karim Shaikh in which he has stated that on 5.5.2001 at about 01.40 a.m. he was standing at ATM centre of HSBC to meet one of his clients namely the applicant herein. He has stated that he came near the ATM centre after a telephone conversation with the applicant and he has given the mobile number of the applicant also.

15. Thereafter in the statement it is stated that the applicant was to receive 1 gm of cocaine out of 9 gms of cocaine which was in Accused No.1’s

possession. Mr.Tulsi, invites my attention to the Arrest Memo of Nasir Abdul Karim Shaikh (accused no.1) wherein it is stated that the accused No.1 was arrested for his involvement in the procurement, possession, transportation and attempted sale of 9 gms of cocaine and narcotic drug seized in the ATM counter of HSBC at Juhu. Mr.Tulsi, has taken me through other documents to support his submission that the prosecution case is clear and there is no question of the applicant being involved in procurement, possession, transportation of 9 gms of cocaine. Mr.Tulsi, has invited my attention to Section 64-A of the NDPS Act. He submits that in the application preferred by the applicant he had disclosed that he is a film actor and as a film actor he is busy with several assignments which require him to stay out of Mumbai and away from his family. There is continuous stress and pressure of work and he has to deliver his best to stay in the competition and market. By this the applicant is stressed and for relieving of the stress he consumed drugs. He had got addicted to the same. In such circumstances, he was justified in relying upon

Section 64-A of the NDPS Act and seeking immunity from prosecution. Mr.Tulsi, in support of his submissions has relied upon a judgment of the Supreme court reported in 2005(3) SCC 551 Pratap Singh vs. Jarkhand and anr. He has emphasized the fact that Section 64-A incorporates a remedial measure. It is required to be construed liberally. Further, interpretation of statute depends upon the text and the context thereof and having regard to the object with which the same was made.

16. Mr.Tulsi, has invited my attention to the system prevalent in countries abroad for treatment of drug addicts. He has invited my attention to some judgments and order rendered by courts abroad while dealing with accused like the applicant. For all these reasons he submits that the application be allowed.

17. M.Kantharia appears for respondent no.1, Narcotic Control Bureau. She has invited my attention to the affidavit of the Investigating Officer of Narcotic Control Bureau and has submitted

that the seized cocaine was brought by the accused no.1 at the instance of accused no.2 for sale to accused no.2 and thereby accused no.1 and 2 have committed an offence punishable under the NDPS Act.

18. She submits that Section 64-A cannot apply to the facts and circumstances of the present case. She submits that any addict is charged with an offence punishable under Section 27 or with offence involving small quantity of narcotic drug or psychotropic substance and who voluntary seeks to undergo medical treatment for de-addiction from a hospital or an institution recognised by a government or a legal authority only can avail of the immunity from the prosecution. Further, he is required to undergo treatment. She submits that the term ‘addict’ is defined under Section 2(i) of the NDPS Act. She submits that there is no material on record to substantiate the contention of he applicant about his dependence on cocaine. Except for his statement that he began using cocaine four months ago solely for his personal consumption, there is nothing to substantiate the claim of the

Immunity. The learned Judge was right in denying relief to the applicant on the basis that Section 64(A) cannot apply to this case. She submits that the entire attempt on the part of the applicant is to delay the trial. He is avoiding facing trial for obvious reasons. This is not a person who is used to consuming drugs but a man who has indulged in procuring, transporting and possessing the same in huge quantity. He is actively associated with the accused No.1 and both are guilty of the offences alleged against them. Hence, no question arises of any intereference with the impugned order. The Revision Application be therefore dismissed.

19. For properly appreciating the rival contention it is necessary to refer to the prosecution case.

20. It is already set out in some details by me in the foregoing paras. At the present stage, it cannot be said that the complaint read as a whole discloses limited role of the petitioner accused as urged by Mr.Tulsi. A copy of the complaint is annexed as Annexure B collectively to the present

Revision Application. NDPS Special Case No. 97 of 2001 is on the basis that the prosecution had kept a surveillance around the ATM centre of HSBC bank at Juhu. The accused no.1 came there and alighted from a Taxi. He was waiting on the footpath opposite ATM centre. An Opel Astra car, more particularly described in the complaint came and stopped near the ATM centre. Accused No.1 Nasir, went near the car and entered the same. He sat next to the driver. The driver of the car accused no.2 came to the ATM centre and punched his card. It is at that stage that the officers entered the ATM centre and the car. The accused no.1 handed over the goods which are Drugs. The goods are nothing but contraband namely 11 vials of cocaine powder. Thereafter there is recovery of mobile phones and driving license.

21. The complait refers to the statement and confessions of Nasir so also that of the present applicant. However, the prosecution, on the basis of the material collected, alleges that accused no.1 and 3 alongwith other known and unknown persons have entered into conspiracy to commit an offence under

the NDPS Act with an intention to possess, sale, purchase and transport cocaine, a Narcotic drug in contravention of the provisions under the Act and thus committed offences under Section 29 read with 8(c) and 21 of the NDPS Act, 1985. The applicant accused is charged with commission of offence punishable under Section 28 read with Section 21 and 8(c) of NDPS Act. The learned Judge in his earlier order has referred to the complaint, the seizure panchanama and has observed that the total quantity of contraband involved in the case is 9 gms out of 15 gms procured by the co-accused from accused no.3 as stated by him in his confessional statement. Thus, 9 gms of cocaine came to be recovered and seized under the panchanama from the spot in the presence of the applicant and accused no.1. At this stage, therefore, the learned Judge was right in holding that it is difficult or rather not possible to arrive at a definite conclusion that the involvement of the applicant is only to the extent of a small quantity. That is something which will have to be established by evidence at the stage of trial. In the earlier order passed by the Special

Judge rejecting the request for amendment of the complaint, he has referred to the submission of the applicant with regard to the applicability of amended provisions of NDPS Act. The argument on behalf of the applicant was that in the amended Act, three categories were either introduced or spelt out, namely, small quantity, non-commercial quantity and commercial quantity. The argument was that punishment for small quantity is not the same for the offence under Section 27 of the NDPS Act. In other words, the argument was identical. The applicant urged that his involvement is only to the extent of 1 gm of cocaine which is a small quantity.

22. The learned Judge has taken note of this argument in his order on Misc.Application No. 78 of 2006 and held that from the materials produced it is not possible to conclude that involvement of the applicant is only to the extent of 1 gm of cocaine.

23. In this behalf a reference can usefully be made to para 10 and 11 of the order dated 5.6.2006 of the Learned Special Judge.

24. In my view the order dated 5.6.2006 read as a whole takes into account both grievances of the applicant. His first grievance about his involvement and depending upon the involvement, immunity from prosecution are matters fully covered by the earlier order.

25. Mr. Tulsi, could not disput this aspect before me. He also could not dispute the fact that earlier order is not challenged by the applicant in the present application. With his assistance I have perused both orders. It is pertinent to note that the submission of the learned advocate for the applicant was that the complaint be directed to be amended so that there is no ambiguity and all defences including invoking of Section 64-A of NDPS Act could be raised. The request has been turned down and while doing so, the learned Judge has observed in para 5 of his order delivered on 5.6.2006 that for claiming immunity from prosecution, the applicant would have to establish that either he is involved in an offence punishable

under Section 27 of the Act or involving small quantity of narcotic drug or psychotropic substance so also comply with further requirements of Section 64A of the NDPS Act. He would also be required to establish that he was an 'addict' as defined under Section 2(i) of the NDPS Act. After observing that the applicant has not established that his involvement is to the extent of small quantity, the learned Judge has not permitted him to invoke Section 64-A of the NDPS Act.

26. It is the same request which was reiterated by filing a fresh application and to my mind, the Learned Judge has not committed any error in not taking cognisance of the same vide the impugned order. Assuming that the involvement of the Applicant is to the extent of small quantity, it is necessary to ascertain whether he fulfils the pre-requisites for claiming Immunity. In this behalf a useful reference can be made to Section 64-A which reads thus :-

> **"Section 64-A. Immunity from prosecution to addicts volunteering for treatment.**-Any addict, who is charged with an offence

> punishable under Section 27 or with offence involving small quantity of narcotic drugs or psychotropic substances, who voluntarily seeks to undergo medical treatment for de-addiction from a hospital and undergoes such treatment shall not be liable to prosecution under Section 27 or under any other section for offences involving small quantity of narcotic drugs or psychotropic substances:
>
> Provided that the said immunity from prosecution may be withdrawn if the addict does not undergo the complete treatment for de-addiction.]

27. A bare perusal of the same would demonstrate that the same has been inserted to ensure that the addicts who are charged with small quantity offences and volunteering for treatment get the benefit of immunity from prosecution. Upon a plain reading of the provision it is apparent that the requirement herein is that the person applying for immunity must be an ‘addict’. An ‘addict’ has been defined in the NDPS Act to mean a person who is dependent on any narcotic drug or phsychotropic substance. The word ‘dependent on any narcotic drug or psychotropic substance’ is crucial in the definition. The element of dependability on the narcotic drug or pschotropic substance is something which the legislature thought it fit to take care of by

granting immunity. The long title to Section 64-A would indicate that the intent is to grant immunity to addict who is charged with offences as enumerated in Section 64-A and who voluntarily seeks to undergo medical treatment for de-addiction from a hospital and undergoes such treatment. The immunity is not absolute and is capable of being withdrawn. Therefore, unless and until immunity is claimed on the basis that all prerequisites stipulated by Section 64-A are fulfilled their cannot be any question of immunity from prosecution. In 2004 (3) Kerala Law Times Pg.270 (Shaji vs. Kerala State) Bail Application Nos.1660, 1736 and 1787 of 2003, similar pleas were rejected in the following words :-

> ". Whether a person is entitled to the immunity provided in Section 64A of the Act, being a person undergoing treatment for de-addiction, is a matter to be specifically urged and proved by production of sufficient evidence by the person concerned. In this case, no such pleading or evidence is brought

> to our notice. Moreover, such immunity applies in cases involving possession of small quantity. In this case, we have already found that the quantity involved is larger than small quantity. Hence, Section 64A does not have any application in this case. "

28. There is substance in the contention of Ms.Kantharia, that there is no material on record, except the bald and bare statement of the applicant, to hold that the applicant is an addict and is involved in the offence to the extent of only a small quantity. Mr.Tulsi relied upon several Decisions rendered and delivered by courts abroad but on a perusal of the same it appears that protection and Immunity was given to Addicts.

29. It is in these circumstances, that I do not feel that it is necessary to enter into any larger controversy and the ambit and scope of the provision empowering the court to grant immunity, assuming that the court can grant the same at this stage. It

is extremely doubtful as to whether such an immunity can be claimed straightaway and when necessary materials are lacking. In my view, the impugned order does not suffer from any error apparent or perversity so as to call for interference in my revisional jurisdiction. The impugned order has also not resulted in manifest injustice in as much as upon proper particulars being furnished and relevant materials produced the Accused can be permitted to invoke Section 64-A of the NDPS Act. The learned Judge was right in rejecting the contentions of by the applicant. More so, when they were already raised earlier before him and rejected.

30. In the result, there is no merit in this Criminal Revision Application and it is dismissed.

sd/-

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